

**Wilmington Sav. Fund Socy., FSB v Matamoro**

2016 NY Slip Op 33144(U)

March 4, 2016

Supreme Court, Kings County

Docket Number: Index No. 10521/14

Judge: David B. Vaughan

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4<sup>th</sup> day of March, 2016

P R E S E N T:

HON. DAVID B. VAUGHAN,  
Justice.

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WILMINGTON SAVINGS FUND SOCIETY, FSB,  
NOT IN ITS INDIVIDUAL CAPACITY BUT  
SOLELY AS TRUSTEE FOR THE PRIMESTAR-H  
FUND 1 TRUST,

Plaintiff,

- against -

JOANNE MATAMORO, et al.,

Defendants.  
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Index No. 10521/14

The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_

1-4 \_\_\_\_\_  
5-6 \_\_\_\_\_  
7 \_\_\_\_\_  
\_\_\_\_\_

Upon the foregoing papers, defendants Joanne Matamoro and Andreas Jennings move for an order, pursuant to CPLR 3211 (a) (1), CPLR 3211 (a) (3), CPLR 3211 (a) (7), CPLR 3013, Estates, Powers and Trusts Law § 7-2.1 (c), CPLR 3012-b, Real Property Actions and Proceedings Law § 1304 and CPLR 6514 (a) dismissing the

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complaint of plaintiff Wilmington Savings Fund Society, FSB and cancelling the notice of pendency.

Plaintiff commenced this action on July 18, 2014 to foreclose a mortgage encumbering the property at 1376 St. Marks Avenue in Brooklyn. The mortgage was executed by defendants on March 26, 2007 to secure a note in favor of Fieldstone Mortgage Company, Inc. ("Fieldstone") in the amount of \$532,000.00. The mortgage was recorded on August 13, 2010 in the name of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Fieldstone. By assignment of mortgage dated March 20, 2013 and recorded April 19, 2013 the mortgage "together with the bond(s) or note(s) or obligation(s) described in said mortgage(s)" was purportedly assigned from MERS to J.P. Morgan Acquisition Corp. ("JPMAC"). By assignment of mortgage dated September 27, 2013 and recorded November 6, 2013, the mortgage "together with the bond(s) or note(s) or obligation(s) described in said mortgage(s)" was purportedly assigned from JPMAC to plaintiff. In its complaint, plaintiff alleges that defendants defaulted under the terms of the mortgage and note by failing to make the monthly payment due on April 1, 2012. With respect to its status as the owner and holder of the note and mortgage, plaintiff alleges the following:

4. On or about March 26, 2007, Joanne Matamoro and Andreas Jennings (the "Borrowers"), executed and delivered to Fieldstone Mortgage Company, Inc. a note whereby they promised to re-pay to Fieldstone mortgage Company, Inc. the principal of \$532,000.00 (the "Note").

5. As security for re-payment of the Note, Borrowers executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. as nominee for Fieldstone Mortgage Company, Inc., (the "Mortgage") in the principal

sum of \$532,000.00 with interest, encumbering the Premises.

6. The Mortgage was duly recorded in the Office of the New York City register at CRFN 201000274619 on August 13, 2010 and the mortgage tax thereon was duly paid.

7. Pursuant to an Assignment of Mortgage dated March 20, 2013 and recorded in the Office on the New York City Register at CRFN 2013000156612 on April 19, 2013, the Mortgage and the indebtedness evidenced by the Note were assigned by Mortgage Electronic Registration Systems, Inc. as nominee for Fieldstone Mortgage Company, Inc. to J.P. Morgan Mortgage Acquisition Corp.

8. Pursuant to an Assignment of Mortgage dated September 27, 2013 and recorded in the Office of the New York City Register at CRFN 2013000458628, the Mortgage and the indebtedness evidenced by the Note were assigned by J.P. Morgan Mortgage Acquisition Corp. to Plaintiff.

On August 27, 2014, defendants brought the instant motion to dismiss the complaint on grounds which include lack of standing.

On a defendant's motion to dismiss the complaint based upon a plaintiff's alleged lack of standing, the burden is on the defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law. See *U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 (2d Dept 2015); *HSBC Mtge. Corp. v MacPherson*, 89 AD3d 1061, 1062 (2d Dept 2011). "To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing." *U.S. Bank N.A. v Guy*, 125 AD3d at 847; *US Bank N.A. v Faruque*, 120 AD3d 575, 578 (2d Dept 2014); *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683 (2d Dept 2012). In a mortgage foreclosure action, a plaintiff has standing where it is the holder or assignee of the underlying note at the time the

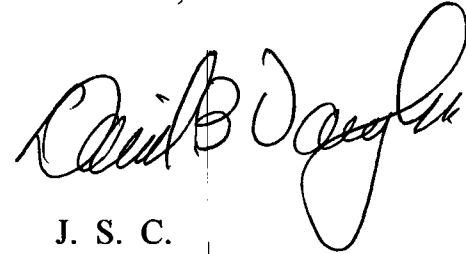
action is commenced. See *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753–754 (2d Dept 2009). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident.” *Aurora Loan Services, LLC v Taylor*, 114 AD3d 627 (2<sup>nd</sup> Dept. 2014). Mere assignment of the mortgage without an effective assignment of the underlying note is a nullity and no interest in the note is acquired because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation. See *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 984 (2d Dept 2015); *Citibank, N.A. v Herman*, 125 AD3d 587, 588 (2d Dept 2015); *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911 (2d Dept 2013); *Bank of N.Y. v Silverberg*, 86 AD3d at 280.

Here, the plaintiff established, through admissible evidence, its standing as the holder of the note and mortgage by demonstrating that the note was physically delivered to it prior to the commencement of this action. Specifically, an affidavit submitted by the plaintiff established that it obtained physical possession of the original note, previously held by JP Morgan Mortgage Acquisition Corp on June 4, 2013, before the action was commenced on July 18, 2014. Defendant has not alleged nor demonstrated that JP Morgan Mortgage Acquisition Corp did not have the note prior to its transfer to the plaintiff. The notice of assignment to Residential Credit Solutions that defendant relies on merely indicates that the servicing of the mortgage loan was transferred, not the note.

Accordingly, defendant's motion is denied.

The foregoing constitutes the decision and order of the Court.

ENTER,



J. S. C.  
HON. DAVID B. VAUGHAN

FILED  
KINGS COUNTY CLERK  
2016 MAR 11 AM 9:32  
